

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1505
74-1529
To be argued by
Stephen D. Gardner

UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket Numbers

74-1529

and

74-1505

Walter H. Weiner,
Petitioner-Appellant

against

Commissioner of Internal Revenue,
Respondent-Appellee

Lois F. Weiner,
Petitioner-Appellee

against

Commissioner of Internal Revenue,
Respondent-Appellant

On Appeal From the United States Tax Court

BRIEF OF PETITIONER-APPELLANT

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Brief of Petitioner-Appellant, Walter H. Weiner

Preliminary Statement

This is an action brought in the United States Tax Court by Petitioner-Appellant, Walter H. Weiner, (the "Husband") against the Respondent-Appellee, Commissioner of

Internal Revenue (the "Commissioner") to contest a deficiency in the amount of \$934.15, asserted by the Commissioner in the Husband's federal income taxes for the calendar year 1965. In determining that a deficiency was due from the Husband, the Commissioner disallowed a deduction of four thousand dollars (\$4,000) representing payments made pursuant to a separation agreement by the Husband to his former wife, Petitioner-Appellee, Lois F. Weiner (the "Wife"). The Commissioner's defense to the Husband's Petition is that the payments made to the Wife were not in the nature of alimony. This brief is submitted in support of the Husband's appeal from the judgment of the United States Tax Court upholding the deficiency.

Issues Presented

1. Did the Tax Court err in holding that the payments made by the Husband to the Wife were not deductible by the Husband?

2. Did the Tax Court err in denying the Husband's motion, made after its decision, to treat a portion of his payments to the Wife as deductible unstated interest?

Statutes Involved

The statutes involved in this action are Sections 71, 215 and 483 of the Internal Revenue Code, 26 U.S.C. Sub-

title A Chapter 1. These statutes are set forth in an addendum hereto.

Statement of the Case

Pursuant to a separation agreement dated as of March 3, 1965 the Husband made payments to the Wife in the total amount of six thousand dollars (\$6,000) during the calendar year 1965. On June 26, 1970 the Commissioner mailed to the Husband a notice of deficiency asserting a deficiency in the amount of \$934.15 in the Husband's federal income tax for that year. In reaching a determination that a deficiency in the Husband's federal income tax existed, the Commissioner disallowed a deduction for four thousand dollars (\$4,000) of the total six thousand dollars (\$6,000) the Husband paid to the Wife. This action is brought to determine that there is no deficiency in federal income taxes due from the Husband for the calendar year 1965.

The Petition was filed by the Husband on September 23, 1970, and was duly answered. In order to protect against the Husband and the Wife successfully taking inconsistent tax positions, the Commissioner asserted a deficiency against the Wife. In reaching that determination, the Commissioner took the position that the payments made by the Husband to the Wife constituted income to the Wife. The Wife filed a Petition in the Tax Court on September 25, 1970, which was

duly answered. On December 28, 1970 the parties moved to consolidate the Petitions brought by the Husband and Wife and the motion was granted on January 4, 1971. The consolidated cases were tried on December 12, 1972 before the United States Tax Court (Honorable Samuel B. Sterrett, presiding Judge). On November 1, 1973 the Tax Court set forth its Findings of Fact and Opinion, and on November 5, 1973 a decision was entered holding that a deficiency in federal income taxes in the amount of \$934.15 was due from the Husband for the calendar year 1965. (Decision)¹. On November 26, 1973 the Husband moved to vacate the deficiency and sought a recomputation of the amount of deficiency. On January 2, 1974 the Tax Court denied the Husband's post-opinion motion to vacate the deficiency. (Order). On April 2, 1974 the Husband filed his notice of appeal.

Statement of Facts

Events Surrounding the Divorce

None of the material facts in this action are in dispute. The controversy relates to the conclusions to be drawn from the facts.

¹ In accord with Rule 30(c) of the Federal Rules of Appellate Procedure, references will be made to the original paging of each part of the record. The following abbreviations of parts of the record have been used herein: (Decision) - Decision of the Tax Court; (Findings) - Findings of Fact and Opinion of the Tax Court; (Order) - Memorandum Sur Order of the Tax Court; (Stip.) - Stipulation of Facts; and (Trans.) - Transcript of the Trial.

The Husband has a legal residence in New York City, New York. His federal income tax return for the calendar year 1965 was filed with the District Director of Internal Revenue, Albany, New York. The Wife has a legal residence in New York City, New York. Her federal income tax returns for the calendar years 1965 and 1966 were filed with the District Director of Internal Revenue, Manhattan, New York.

The Husband and Wife were married on September 7, 1952. (Stip. Par. 1). The Husband and Wife entered into a separation agreement (the "Separation Agreement") dated as of March 3, 1965. The Separation Agreement provided in relevant part as follows:

"3(a) The Husband and the Wife recognize that, having regard for the financial circumstances of the parties and the financial requirements imposed on the Husband in view of the custody arrangements hereinafter set forth, the Wife will require \$200 a month from the Husband for her support and maintenance,.... Husband and Wife agree, however, that supplementary payments over a period of several years shall be made by the Husband to the Wife in order to help defray the relatively substantial disbursements which the Wife may make in paying certain extraordinary current expenses and in establishing a residence separate from that of the Husband and the Children. In contemplation of the foregoing..., the Husband has agreed to make, and the Wife has agreed to accept, in full satisfaction of her rights during her life to support and maintenance from the Husband the following periodic payments:

(1) \$200 on the first day of each month commencing March 1, 1965, and ending on the first day of the month in which the Wife shall either die or remarry, whichever shall first occur;

(11) \$400 on the first day of each month commencing March 1, 1965, and terminating on the first day of the month in which total payments to the Wife pursuant to this subparagraph (ii) equal or exceed \$29,000, provided however, that if, for any reason, the income of the Husband shall diminish from his income during 1964 from the practice of law, or the financial requirements of the Children would be impaired by making such additional payments in the amount of \$400, the Husband may, at his option, reduce such additional payment to an amount not less than \$200 a month, in which case additional payments to the Wife pursuant to this subparagraph (ii) shall continue until the first day of the month in which total payments to the Wife pursuant to this subparagraph (ii) equal or exceed \$29,000.

(b) Anything in this Agreement to the contrary notwithstanding, the obligations of the Husband to make the payments provided in Section 3(a) of this Agreement shall not extend beyond the lifetime of the Wife." (Stip. Par. 2; Joint Exhibit No. 1).

In March of 1965 the Husband and Wife were divorced and the Separation Agreement was incorporated in the divorce decree. (Stip. Par. 3). In the calendar year 1965 the Husband paid \$6,000 to the Wife, \$4,000 of which was in discharge of the obligation set forth in Paragraph 3(a)(11) of the Separation Agreement. The Husband deducted these payments from his gross income on his 1965 federal income tax return. For the calendar year 1965 the Wife did not include as income on her federal income tax return \$4,000 of the \$6,000 she received from the Husband in that year.

At the time the Wife entered into the Separation Agreement she was informed by her attorney that all of the payments made to her by the Husband pursuant to the Separation

tion Agreement would constitute taxable income to her. (Trans. Pg. 112, lines 8-11; Pg. 113, lines 20-25).

During their marriage the Wife was hospitalized for substantial periods of time. (Stip. Par. 4). In order to meet the large expenses caused by her illness, the Wife's family gave the Husband and Wife frequent and substantial gifts of money and stock during the course of their marriage. (Stip. Par. 8(b); Trans. Pg. 77, lines 1-7).

In 1958 the Wife asked the Husband to purchase a large house for their family, which then included the parties' two children. The Husband agreed to purchase such a house since he was advised that failure to comply with his wife's request might seriously impair her health. (Stip. Par. 8(c); Trans. Pg. 78, lines 4-22). Since the Husband lacked funds to purchase a large house, he asked his then mother-in-law for funds to make the purchase and she agreed to provide the funds. To accomplish this she arranged for a transfer of stock to the Wife of a value of approximately \$29,500. (Stip. Par. 8(a) and 8(e); Trans. Pg. 78-83). Neither the Husband nor the Wife was ever asked to, nor did they, pay back to the Wife's family or anyone else any of the gifts and advances which were made by the Wife's family during her marriage, including the stock transferred to finance the purchase of the house.

Tax Court Decision and Subsequent Events

Neither the Husband nor the Wife nor the Commissioner

throughout their respective pleadings and briefs argued that the payments made by the Husband to the Wife pursuant to Paragraph 3(a)(ii) of the Separation Agreement were intended to be a purchase by the Husband of the house then owned by the two of them. Furthermore, there was no contention at trial or in the parties' briefs that those payments were intended to be a property settlement. The Commissioner remained neutral throughout the proceedings, except with respect to the Husband's post-opinion motion. The sole contention of the Wife, throughout the proceedings, was that the payments were a repayment of a loan. The case was tried by the parties on that basis.

In its Findings of Fact and Opinion, the Tax Court held, "Based on all the evidence, we find that the separation agreement in reality, provided for payment to Lois for her equity in the house, which recompense she had demanded throughout the divorce negotiations." (Findings, Pg. 11). Subsequent to that holding, the Husband moved to vacate the decision and to seek a recomputation of the deficiency based upon the requirements of Section 483 of the Internal Revenue Code which states in pertinent part that, "For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies..." This motion was denied by the Tax Court on the grounds that the issue had not been raised in the pleadings or at the time of the trial.

Argument

I

The Payments Made By The Husband Should Have Been Held To Be Deductible By Him

In reaching its decision that the Husband was not entitled to deduct the amounts paid to the Wife pursuant to Paragraph 3(a)(ii) of the Separation Agreement, the Tax Court concluded that those payments were in the nature of a property settlement rather than in the nature of alimony payments. As set forth above, the only provisions of the Separation Agreement which are in issue are Paragraph 3(a)(ii), which provides, in part, "\$400 on the first day of each month commencing March 1, 1965, and terminating on the first day of the month in which total payments to the Wife pursuant to this subparagraph (ii) equal or exceed \$29,000..." and Section 3(b), which provides, "Anything in this Agreement to the contrary notwithstanding, the obligations of the Husband to make the payment provided in Section 3(a) of this Agreement shall not extend beyond the lifetime of the Wife."

Section 71(a) of the Internal Revenue Code provides that a wife must include within her gross income "periodic payments" received in discharge of a legal obligation which is imposed upon the husband because of the marital relationship. Section 215 of the Internal Revenue Code provides the corollary to Section 71 by permitting the husband to deduct from his gross income the periodic payments which are

included by the wife. Section 71(c) of the Internal Revenue Code provides, however, that installment payments, payable over a period of less than ten years which discharge a part of an obligation the principal sum of which is specified in terms of money, will not normally be treated as periodic payments.

In setting forth the rules which are to be applied in determining whether such short-term installment payments, similar to those involved herein, are to be treated as periodic payments and thus includible in the wife's gross income and deductible by the husband, Treasury Regulations Section 1.71-1(d)(3)(i) provides, "Where payments under a... agreement are to be paid over a period ending 10 years or less from the date of such...agreement, such payments are not installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the...agreement (and are considered periodic payments for the purposes of Section 71(2)) only if such payments meet the following two conditions: (a) such payments are subject to any one or more of the contingencies of death of either spouse...and (b) such payments are in the nature of alimony or an allowance for support."

The payments made by the Husband to the Wife pursuant to Paragraph 3(a)(ii) of the Separation Agreement were governed by Section 3(b) of the Separation Agreement, which specifically provided that those payments were to

terminate upon the death of the Wife. The sole contention made by the Wife with respect to this issue was that the payments were for the repayment of a loan, and that contention was not accepted by the Tax Court. Therefore, those payments fit within the scope of Treasury Regulations Section 1.71-1(d)(3)(i) and should be includible in the Wife's gross income and deductible by the Husband. As the Court of Appeals for the Fifth Circuit recently stated in a different factual setting, "A taxpayer has the right to rely upon the Government's Regulations and their published illustrations. Treasury Regulations, having the force and effect of law, are binding on tax officials as well as taxpayers." Mutual Savings Life Insurance Co. v. United States, 488 F.2d 1142, at p. 1145 (5th Cir. 1974).

In reaching its decision in the instant case, the Tax Court stated that "...labels attached to payments made in connection with divorces or separations are not controlling." (Findings, Pg. 8-9); that "It is the intent of the parties that it is controlling." (Findings, Pg. 9). The court then saw fit to disregard totally the loan contention on which the case was tried, and to ignore the fact that the Wife was fully apprised of the tax consequences of the Separation Agreement by her attorney when she signed the agreement. The court concluded that it would be guided by its decision in Edith M. Gerlach, 55 T.C. 156 (1970), and that in the context of a dispute over the meaning of

terms in a separation agreement, it would not follow either the strict "parol evidence rule" set forth in Commissioner v. Danielson, 378 F.2d 771 (3rd Cir. 1967) rev'g 44 T.C. 549 (1965), or the more lenient "strong proof rule" set forth by the Tax Court in J. Leonard Schmidtz, 51 T.C. 306 (1968), aff'd sub.nom Thronson v. Commissioner, 457 F.2d 1022 (9th Cir. 1972) and by this Court in Ullman v. Commissioner, 264 F.2d 305 (2nd Cir. 1959), aff'g 29 T.C. 129 (1957) (Opinion Pg. 9-11).

Initially, the Husband submits that there is no evidence in the record upon which the Tax Court could have concluded that it was the intent of the parties to treat the payments made pursuant to Paragraph 3(a)(ii) of the Separation Agreement as a property settlement. The most telling and direct evidence on this question is the testimony of Alvin Miller, Esquire, the Wife's attorney at the time of the Separation Agreement and at the time of the trial in the Tax Court. He testified, "I also pointed out to Mrs. Weiner the fact that there was to be a repayment of \$29,000, but it was to be considered as alimony which would be taxable to her." (Trans. Pg. 112, lines 8-10). And again,

"Q. Mr. Miller, I just want to clarify a point or two. I take it from what you testified to that you advised Mrs. Weiner at the time when the agreement was finally signed that these

funds or this payment would be taxable to her?

A. Yes, I did.

Q. And, correspondingly deductible by Mr. Weiner; is that correct?

A. Yes." (Trans. Pg. 113-114).

Both the Wife (Trans. Pg. 34-37) and the Husband (Trans. Pg. 100-101) testified that the total dollar amount to be paid pursuant to Section 3(a)(11) of the Separation Agreement was related to the value of certain securities given by the Wife's family to the Wife. However, there was no testimony by the Wife, nor is there any other evidence that it was the intent of either party for such payment to be viewed as a property settlement rather than a payment in the nature of alimony. The sole characterization asserted by the Wife at the trial and in her main brief was that the payments were in the nature of a loan repayment.

The Tax Court's reliance on Edith M. Gerlach, 55 T.C. 156 (1970), is misplaced. In that case, the petitioner received payments pursuant to a divorce decree which incorporated a separation agreement which in turn was based upon an oral stipulation that had been summarized in open court by counsel for the husband and wife. The facts in Gerlach indicated that there was a definite ambiguity as to the intent of the parties with regard to the payments in issue. The

evidence reflected that throughout the negotiations the wife had been seeking one-half of the total property acquired by the husband and wife during their marriage and that the parties had agreed to cash payments to be made by the husband to the wife over a 12-1/2 year period in lieu of a division of their property.

The court in Gerlach, therefore, could reasonably conclude from the evidence that the payments were intended to be a property settlement and thus not includable by Mrs. Gerlach even though they were made pursuant to a provision of the agreement entitled "Alimony". In reaching its conclusion in Gerlach the Tax Court chose to disregard the language of the separation agreement and accept the testimony of the wife offered in court. In so doing, the Tax Court rejected numerous cases decided in different contexts of the tax law that either required a taxpayer to introduce "strong proof" to overcome the tax consequences dictated by a written agreement or required a taxpayer to show fraud, duress, etc. to overcome such consequences.

It is not necessary for this Court to decide the issue raised in Gerlach in order to reverse the Tax Court in the instant case. There is no ambiguity in the Separation Agreement involved herein, and there was no evidence introduced at trial to suggest that either party intended the payments which the Husband made to the Wife to be treated as anything other than alimony and thus deductible by the Husband. The Husband and the Wife in the instant

case were both represented by independent counsel. As is often the case in negotiating separation agreements, numerous conflicting and competing considerations were balanced and compromised before a final agreement was reached. When, as here, both parties agree to treat particular payments as alimony for federal income tax purposes, courts should not attempt to revise the unambiguous terms of such agreements absent a clear showing that the agreement never represented the intent of both parties. No such showing has been made in the instant case.

If this Court does consider it necessary, however, to decide the issue raised by the Tax Court below, this Court should reverse the Tax Court for following Gerlach. In Gerlach, the Tax Court rejected the rationale of Commissioner v. Danielson, 378 F.2d 771 (3rd Cir. 1967), rev'g 44 T.C. 549 (1965). Danielson held, where an agreement had been entered into between two parties which allocated the purchase price of a business between a covenant not to compete and other assets, that one of the parties to that agreement could not treat, for tax purposes, the payments in a manner different than that provided for in the agreement unless he was able to adduce proof which, in an action between the parties to the agreement, would be admissible to alter its construction because of mistake, undue influence, fraud, duress, etc.

The reasons for the holding enunciated in Danielson were: (1) that the parties to the agreement were aware of the

tax consequences and to permit a unilateral reformation of the contract in a tax proceeding would result in unjust enrichment to one party; (2) that a different rule would permit the use of the tax laws to obtain relief from an unfavorable agreement; (3) that such a result would nullify the predictable tax consequences of the agreement; and (4) that to hold otherwise would cause the Commissioner considerable administrative problems because he would be unable to accept taxpayers' agreements at face value. These reasons are equally applicable to a dispute over the tax consequences of a separation agreement.

In the negotiation of a separation agreement, the anticipated federal income tax consequences of payments by a husband to a wife are often determinative of the gross amount paid, the length of time the payments are to last, the frequency of the payments, etc. To undo the income tax consequences agreed upon by the parties without revising those other factors would be unjust and would in effect put the Tax Court in the business of a family court which must consider all relevant factors in awarding support and maintenance. To allow a wife or a husband to use the Tax Court as a tool to renegotiate one of the agreed upon terms of a separation agreement is likely to open the floodgates of litigation before a tribunal ill-suited to decide these questions.

If this Court concludes, in the instant case, that it is necessary to examine the applicability of the Danielson rule to payments made pursuant to a separation agreement as

between "alimony payments" and "property settlement payments" it is respectfully submitted that there is no justification for adopting a rule other than Danielson. Where the parties have been advised as to the tax consequences of their separation agreement and both parties are represented by counsel, there is no justification for permitting a subsequent modification of those tax consequences because one of the parties is no longer satisfied with those results. See, White Farm Equipment Co., 61 T.C. 189 (1973), appeal docketed.

It is recognized that this Court has neither accepted nor rejected the Danielson rule. See, Estate of Rogers v. Commissioner, 445 F.2d 1020 (2nd Cir. 1971). This Court has, however, applied what has come to be known as the "strong proof" rule in order for a party to overcome the tax consequences that flow from a contract which he executed. See Ullman v. Commissioner, 264 F.2d 305 (2nd Cir. 1959). Regardless of whether this Court considers it necessary for a disposition of the instant case to determine whether it should follow the mistake, undue influence, fraud, etc. tests of Danielson, or the strong proof rule of Estate of Rogers and Ullman, it is respectfully submitted that the evidence set forth in the record below will meet neither of those burdens.

The clear and unambiguous language of the Separation Agreement, the testimony of the Wife's attorney that he advised her that the payments were to be taxable and the lack

of any evidence to the effect that either party intended the payments made pursuant to Paragraph 3(a)(11) of the Separation Agreement to be treated as anything other than alimony requires this Court to hold that the Tax Court erred as a matter of law in not following the relevant Treasury Regulations and holding that the payments made by the Husband to the Wife pursuant to Section 3(a)(11) of the Separation Agreement were deductible by the Husband pursuant to Section 215 of the Code. Furthermore, since the sole contention of the Wife was that the payments were a repayment of a loan, and all of the evidence was contrary to such assertion, this Court should vacate the decision of the Tax Court and hold that the payments were deductible by the Husband, or at the least, remand this case for further hearings with regard to the intent of the parties.

II

Section 483 Of The Internal Revenue Code Should Have Been Applied To The Husband's Payments As Characterized By The Tax Court

The Tax Court in holding that the payments made by the Husband to the Wife were not deductible found that, "Based on all the evidence, we find that the Separation Agreement in reality, provided for payment to Lois for her equity in the house, which recompense she had demanded throughout the divorce negotiations." (Findings Pg. 11). This finding by the Tax

Court was the first time during the proceedings below in which any party or the court indicated that the payments by the Husband to the Wife were intended to be for the Wife's "equity in the house".

Section 483(a) of the Code provides, "For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of the payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract." Treasury Regulations Section 1.483-1 (b)(1) provides, "...section 483 applies to any payment made after December 31, 1963, on account of a sale or exchange for property occurring after June 30, 1963, which payment constitutes part or all of the sales price and which is due more than 6 months after the date of such sale or exchange... The term 'sale or exchange' includes any transaction treated as a sale or exchange for purposes of the Code."

Although we have been unable to find cases applying Section 483 to a payment which is characterized as a property settlement, the scope of Section 483 is pervasive. The Section states unambiguously that it applies to all sections of Title 26 of the United States Code. The Supreme Court has held that payments made by a husband to a wife pursuant to property settlements are to be treated as taxable exchanges; see Davis

v. United States, 370 U.S. 65 (1962). Treasury Regulations Section 1.483-2(b)(2) lists numerous provisions of the Code to which Section 483 applies and indicates that the provision "cuts across" virtually all other substantive tax provisions.

In rejecting the Husband's post-opinion motion to vacate its decision, the Tax Court stated that it could not consider the question of the applicability of Section 483 to the payments made by the Husband since that question had not been raised in the pleadings or at the time of the trial. In support of its decision, the Tax Court cited Estate of Akos Anthony Horvath, 59 T.C. 551 (1973). (Order).

It is respectfully submitted that reliance on cases such as Horvath for a denial of the Husband's motion are inapposite. Those cases stand for the proposition that the Commissioner may not raise at trial an issue he has not previously raised in either his deficiency notice, answer or other pleadings prior to trial. Furthermore, cases such as J. William Frentz, 44 T.C. 485 (1965), aff'd 375 F.2d 662 (6th Cir. 1967), which hold that a petitioner in a Tax Court action cannot raise an alternative argument in his briefs which had not previously been raised in his pleadings, are also wholly inapposite. It is the Husband's contention that the law of this Circuit, as well as most other Circuits, is to the effect that a post-opinion motion is the appropriate manner for questioning an issue which has been raised sua sponte by the decision of the trial court and not by either of the parties to

the lawsuit. In addition, this Court has recognized that on review it may reverse a discretionary denial by the Tax Court of a post-opinion motion if extraordinary circumstances exist. Pepi, Inc. v. Commissioner, 448 F.2d 141 (2nd Cir. 1971). Since the sole contention of the Wife was her "loan" theory, the Husband was unduly surprised when the Tax Court decided the case on an entirely different basis, and thus, the necessary extraordinary circumstances should be found to exist.

In Wilson v. Commissioner, Docket No. 73-2820, F.2d (2nd Cir. 1974), decided on August 6, 1974, this Court recognized that in certain instances a petitioner could raise issues subsequent to a trial in the Tax Court when the facts relating to those issues were initially discovered at or after the trial. The holding in Wilson, although not citing them, essentially follows a line of tax cases that can be traced to Helvering v. Edison Securities Corporation, 78 F.2d 85 (4th Cir. 1935), where the court held that the Board of Tax Appeals (the forerunner of the United States Tax Court) had both the power and authority to redetermine a tax deficiency on a motion for rehearing where, "In the pending case, however, the new matter was not introduced by the parties but by the Board itself, and the subsequent course of the proceedings should have been shaped with this circumstance in mind." 78 F.2d at 91. See also, Commissioner v. Ray, 88 F.2d 891 (7th Cir. 1937), cert. den. 301 U.S. 711,

where the court reached essentially the same conclusion as that set forth in Edison Securities.

Conclusion

For the reasons stated, we ask that the judgment below be reversed and that the case be remanded to the United States Tax Court with instructions to enter judgment that there is no deficiency due from Petitioner-Appellant, Walter H. Weiner, or, in the alternative, for a further hearing as to the intent of the parties with respect to their Separation Agreement. Alternatively, in the event that this Court does not reverse the decision of the Tax Court with respect to the nature of the payments made pursuant to Section 3(a)(ii) of the Separation Agreement, we ask that the order denying Petitioner-Appellant's motion for a redetermination of the tax deficiency be vacated and the case be remanded to the Tax Court for a further determination on the question of whether Section 483 of the Code is applicable to the payments made by the Husband to the Wife.

New York, New York
August 30, 1974

Respectfully submitted
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STATUTORY ADDENDUM

Section 71 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS

(a) General Rule.--

(1) Decree of Divorce or Separate Maintenance.-- If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) Written Separation Agreement.-- If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly. ...

(c) Principal Sum Paid in Installments.--

(1) General Rule.-- For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.

(2) Where Period For Payment Is More Than 10 Years.-- If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment

payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received. ...

Section 215 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 215. ALIMONY, ETC., PAYMENTS.

(a) General Rule.-- In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income. ...

Section 483 of the Internal Revenue Code
26 U.S.C., Subtitle A, Chapter 1

Sec. 483. INTEREST ON CERTAIN DEFERRED PAYMENTS.

(a) Amount Constituting Interest.-- For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract.

(b) Total Unstated Interest.-- For purposes of this section, the term "total unstated interest" means, with respect to a contract for the sale or exchange of property, an amount equal to the excess of--

(1) the sum of the payments to which this section applies which are due under the contract, over

(2) the sum of the present values of such payments and the present values of any interest payments due under the contract.

For purposes of paragraph (2), the present value of a payment shall be determined, as of the date of the sale or exchange, by discounting such payment at the rate, and in the manner, provided in regulations prescribed by the Secretary or his delegate. Such regulations shall provide for discounting on the basis of 6-month brackets and shall provide that the present value of any interest payment due not more than 6 months after the date of the sale or exchange is an amount equal to 100 percent of such payment. ...

UNITED STATES COURT OF APPEALS
For the Second Circuit

- - - - - X

Walter H. Weiner,	:	
Petitioner-Appellant	:	AFFIDAVIT
against	:	<u>SERVICE BY MAIL</u>
Commissioner of Internal Revenue,	:	
Respondent-Appellee	:	Docket Numbers
	:	74/1529/74-1505
Lois F. Weiner,	:	
Petitioner-Appellee	:	
against	:	
Commissioner of Internal Revenue,	:	
Respondent-Appellant	:	

- - - - - X

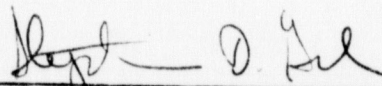
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEPHEN D. GARDNER, being duly sworn, deposes and says:


1. I am not a party to this action and am over eighteen years of age. I reside at 32 Gramercy Park South, New York, New York.

2. On the 30th day of August, 1974 I served the within brief of Petitioner-Appellant, Walter H. Weiner upon Alvin Miller, Esq., attorney for Petitioner-Appellee, Lois F. Weiner at 342 Madison Avenue, New York, New York and Scott P. Crampton, Esq., counsel for the Commissioner of Internal Revenue, at the Tax Division, United States Department of Justice, Washington, D.C. 20530, the addresses designed by said attorneys for that purpose by depositing true copies of the within brief enclosed in a postpaid properly

addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Stephen D. Gardner

Sworn to before me this
30th day of August, 1974.


Notary Public

RUTH A. JONES
NOTARY PUBLIC, State of New York
No. 311999583
Qualified in New York County
Commission Expires March 30, 1975

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

- ☐ Certification By Attorney
☐ Attorney's Affirmation

certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

- ☐ Individual Verification
☐ Corporate Verification

being duly sworn, deposes and says: deponent is the foregoing in the within action; deponent has read and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action.

Check Applicable Box

- ☐ Affidavit of Service By Mail
☐ Affidavit of Personal Service

On 19 deponent served the within attorney(s) for upon in this action, at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On 19 at deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

NOTICE OF ENTRY

Index No

Sir:- Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Walter

Dated,

Yours, etc.,

Commis

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN

* Attorneys for

Office and Post Office Address

1345 Avenue of the Americas

Borough of Manhattan

New York, N. Y. 10019

Lois

Commis

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

KRONIS

Attorneys

one of the judges of the within named Court, at

Off

on the day of

19

at M.

Borough of

Dated,

Yours, etc.,

To

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN

Attorneys for

Attorney(s)

Office and Post Office Address

1345 Avenue of the Americas

Borough of Manhattan

New York, N. Y. 10019

Service of

Dated,

To

Attorney(s) for

Attorney(s)

S 74/1529/
74/1505

Year 1974

r H. Weiner,
Petitioner-Appellant
against
ssioner of Internal Revenue,
Respondent-Appellee

F. Weiner,
Petitioner-Appellee
against
ssioner of Internal Revenue,
Respondent-Appellant

AFFIDAVIT SERVICE
BY MAIL

H. LIEB, SHAINSWIT, WEINER & HELLMAN

for Petitioner-Appellant

ice and Post Office Address, Telephone

345 Avenue of the Americas

Manhattan

New York, N. Y. 10019

765-6000

) for

a copy of the within

is hereby admitted.

) for